BOOK REVIEWS.

THE LAW OF TORTS. By Francis M. Burdick. Albany, N. Y.: Banks & Co. 1905. pp. lxxx, 501.

It is rather hard for English lawyers to understand how text-writers in America can cope with the task of extracting a body of doctrine from the decisions of more than two score independent (nearly fifty, when we include the Federal courts and England) jurisdictions, and presenting it with sufficient accuracy for practical purposes and in a reasonable compass. Professor Burdick appears to have achieved this with remarkable success. He has inevitably sacrificed, to some extent, the exposition of his own views, but he never leaves the reader without a hint or two for his guidance. The volume is rather larger and more of a practitioner's, as distinct from a student's book, than Harriman on Contracts or the latest form of Bigelow on Torts; the table of cases covers fifty-nine pages, and a methodical table of contents makes it needless for the index at the end of the volume to be of overgrown dimensions. As I conceive that Professor Burdick has no need to vouch any English lawyer to warrant his competence, I shall set down a few notes on some points of general interest, as they occur in his treatment of the subject.

On the vexed question of damages for nervous shock, Professor Burdick is in line with the English judges who have declined to follow the reasoning of the Judicial Committee in *Victorian Ry. Commrs.* v. *Coultas*. "That serious physical disorder is the every-day consequence of fright or nervous shock is a fact not only established in modern science, but one which has long been accepted by the ordinary man. It would seem, therefore, to fall within the category of natural and probable consequences." The temptation to evade hard questions of mixed law and fact by laying down arbitrary rules is by no means peculiar to these cases. Yielding to it is generally a cause of greater trouble in the long run.

With regard to the "fellow-servant rule"—usually referred to in English books under the less expressive catch-word of "common employment"—far less has been done to alter its effects by legislation in the United States than in England, but, perhaps by a sort of unconscious compensation, the master's common-law duties of selecting competent servants and providing reasonably safe conditions and appliances for the work are put higher, being treated as personal and not admitting of delegation.

Professor Burdick seems to incline, if not more, to the opinion that conspiracy is a substantive or separate cause of action. If this means that a combination, not being in itself an indictable offence, to do something which, if done by one person to the plaintiff's damage, would not be actionable, may in the result be actionable merely by reason of the plural number of the defendants, I venture to think the better opinion is otherwise. As to Lord Halsbury's reference to *Gregory* v. *Duke of Brunswick*, which appears to have made a certain impression (Burdick, p. 289, n. 72), there is no such difference as is suggested between the published reports of that case, nor were the

pleadings such as to raise the question supposed. The defendant's plea in justification (one of those gems which shine amidst the dulness of common forms) did not deny the cause of action; it was held bad because it avoided part only and neither confessed nor avoided the rest. It was assumed, indeed, that the conspiracy as laid was on the face of it actionable; as indeed it was, for the declaration charged a conspiracy to procure a riot, which would be a criminal offence. It was neither assumed nor decided that it was lawful for one person alone to hiss an actor from a set purpose of driving him off the stage and preventing his performance, though it was held at a later stage of the case that the plaintiff, having elected to rest his case on the ground of conspiracy, must abide by that ground. Even if it be true that in *Gregory* v. *Duke of Brunswick* the separate existence of the action for conspiracy was assumed by counsel and the court, there is enough authority to the contrary to prevail. It is the fact, of course, that many things not worth suing for (but that is not the same as being lawful) when done by one person may become very serious injuries when done in concert by several; as Sergeant Williams said long ago, the conspiracy is matter of aggravation. If I am wrong herein, it is in company with my learned friend Mr. Bigelow (Law of Torts, 2d ed., p. 107).

It is rather confusing to an English lawyer to find less than one page about the remedy by injunction, and that only under the special head of Nuisance. This, I presume, is due to the continuing separation of equitable and legal jurisdiction in many if not most of the United States. What would be the effect of Professor Burdick's one page on the mind of an English-speaking reader who had not chanced to hear otherwise of "government by injunction"?

Under the head of Negligence it is interesting that in a majority of jurisdictions it is held, as in England, that there is no rule of law which requires the plaintiff to show as a part of his case that he was in the exercise of due care. This, we think, is the sounder view; but the opposite opinion must be admitted to come with good suit when it is backed by Connecticut, Illinois, Iowa, Maine, Massachusetts, and Michigan.

There is nothing in English books exactly corresponding to the controversy that has raged of late years about the "turntable cases". So far as there have been similar facts before our courts the main point of the defence has been remoteness of damage rather than a square denial that there was any duty in the matter. Moreover, in the cases where children have been allowed to recover in such circumstances as would have disqualified adults on the ground of contributory negligence, or where the disallowance has been criticised by later authority, we find that the defendant had brought danger into the children's way in a public place. In the nearest case to the American line, *Williams* v. *G. W. R. Co.* (1874) L. R. 9 Ex. 157, there was no proof that the child was trespassing or had trespassed. No English decision goes the length of holding that a man is bound to have his land in a safe condition for infant or imbecile more than for normal adult trespassers. On the other hand, there is certainly no such rule as that a trespasser can never recover, or that one can never be bound to foresee trespasses and use appropriate caution to prevent their con-

sequences. In *McDowall* v. *The Q. W. R. Co.* [1903] 2 K. B. 331, our Court of Appeal reversed the judgment below, not because the railway company could not be liable to a passer-by suffering from tricks played with its rolling stock by trespassers, but because the particular trick that was played was not such as any former experience could lead a reasonable man to anticipate. Now in the leading American case, *R. R. Co.* v. *Stout*, the company had actually used precaution which with timely repair would have been sufficient, and thus had established, one may almost say, a measure of duty against itself. If this be not the decisive fact in the case, the Supreme Court would seem (with great respect) almost to have held that the mere occurrence of an accident shows that particular accident to have been probable, at any rate when the sufferer is an infant; or, rather, entitles a jury to say it was probable: which, as it is more tempting to be generous to the plaintiff at the defendant's expense than to be just to the defendant, they commonly do. I do not think any English court has gone quite so far.

Some American courts appear to have carried their charity toward infants to the point of putting an infant trespasser in a better position than an adult licensee; for it is well settled in America (I collect from our learned author) no less than in England that a mere licensee is entitled at most not to suffer from concealed danger created by the occupier's acts. In *Union Pac. Ry.* v. *McDonald* (1894) 152 U. S. 262, the burning slack heap under ashes was such a danger; there was no one to tell the plaintiff, in the substance of the Horatian phrase which exactly fits, *Incedis per ignes suppositos cineri doloso.* An adult, it is admitted, might equally have recovered without assigning any cause for a slight and apparently harmless deviation from the pathway. In fact the defendant had created a dangerous nuisance: *Barnes* v. *Ward*, 9 C. B. 392, is a similar and less strong case, and of undoubted authority. From a decision so manifestly just there is no ground to infer any general encouragement of the "curious and agile" infant trespasser; and we do not suppose that he will find much in England when the occasion arises. On the whole the learned criticism of Professor Jeremiah Smith and Professor Burdick seems justified. This is quite consistent with holding that one who is aware in a specific case, of a helpless, infirm or incapable person being exposed to danger from something in his conduct and control, is bound to a special measure of caution according to the apparent risk, meaning thereby the risk which would be perceived then and there by a vigilant reasonable man.

FREDERICK POLLOCK.

A TREATISE ON THE LAW OF REAL PROPERTY. By Frank Goodwin. Boston: Little, Brown & Co. 1905. pp. lii, 531.

That a lecturer for many years on the law of real property should ultimately embody in permanent form the substance of his lectures is natural as well as commendable, and it must be conceded that there is an audience for Professor Goodwin beyond the limits of his class room. There is much in the law of real property that lends itself to the didactic and expository form of instruction, and the little volume before us makes ood use of the opportunity. Re-